

1986

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN STOCK EXCHANGE AND NATIONAL

GUARANTEE FUND BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Lionel Bowen, M.P.
Deputy Prime Minister and Attorney-General)

AUSTRALIAN STOCK EXCHANGE AND NATIONAL GUARANTEE FUND BILL 1986

OUTLINE

The purpose of the Australian Stock Exchange and National Guarantee Fund Bill 1986 ('the Bill') is twofold:

- . to provide legislative support for a reorganisation of stock exchanges in Australia to establish a single national stock exchange, the Australian Stock Exchange Ltd ('ASX Ltd') with each of the 6 current capital city exchanges as subsidiaries of it
 - . to create a national guarantee fund ('NGF') consisting of the pooled assets of the existing fidelity funds operated by the separate capital city exchanges, which will provide greater protection to investors in respect of failure of contracting parties to meet their transaction obligations or in respect of dealer insolvency.
2. These initiatives will be effected by amendment to the Securities Industry Act 1980.
3. This Bill, which has been approved by the Ministerial Council for Companies and Securities, is submitted to the Commonwealth Parliament in accordance with the Commonwealth's obligations under the Formal Agreement entered into with the States on 22 December 1978 (to which the Northern Territory recently became a party).
4. If enacted, these provisions will, subject to the making of regulations for each State and the Northern Territory to effect any necessary local modifications ('translator regulations'), have automatic effect in each State and Territory without the need for further and separate substantive State or Territory legislation.

5. In the event of the Commonwealth Parliament not enacting these amendments within six months of their approval by the Ministerial Council, each State has the right to take action separately to implement the decision of the Ministerial Council (see Formal Agreement Cl.44).

Financial Impact Statement

6. The changes made by this Bill should not have any financial impact on Government revenue and expenditure. Sharemarket investors will benefit from the contract guarantee and insolvency provisions of the NGF. The capital market is expected to become more efficient from the more co-ordinated, centralized approach in the ASX proposals. In addition, allocation of excess funds from the NGF to national development purposes approved by Ministerial Council will support technological advances with resulting efficiencies.

Explanatory Memorandum

7. The remainder of this explanatory memorandum

- (a) contains a brief outline of the main features contained in the Bill;
- (b) contains a list of abbreviations used in the explanatory memorandum on particular clauses; and
- (c) deals sequentially with the content of each clause of the Bill.

OUTLINE OF MAJOR FEATURES OF THE BILL

(i) Australian Stock Exchange Ltd ('ASX Ltd')

8. The main features of this aspect of the Bill are as follows:

- (a) ASX Ltd will be incorporated in the ACT by the Bill, and will be deemed to be a body corporate limited by guarantee under the Companies Act 1981.
- (b) The existing capital city exchanges will become wholly owned subsidiaries of ASX Ltd and those exchanges' members will cease membership of their particular exchange and become members of ASX Ltd.
- (c) ASX Ltd will be responsible for listing and all listing on the main board will be a listing on ASX Ltd. Accordingly, listing agreements will be between ASX Ltd and the listed company.
- (d) State subsidiaries will continue to conduct a stock market and will exercise any powers and perform any functions delegated by the ASX Ltd holding company. For example, the State subsidiaries will conduct their existing 'main board' markets on behalf of ASX Ltd.
- (e) State subsidiaries will remain wholly responsible for their second board, options or futures markets.
- (f) The Australian Associated Stock Exchanges ('AASE') will be wound up by the Bill.
- (g) Existing capital city exchanges will pay a designated amount to the ASX Ltd in respect of transferred functions.

- (h) Many features of the reorganisation will appear in the memorandum and articles of association or the business rules of the ASX Ltd and accordingly will not require legislative amendments.

9. Legislative support for this restructuring is necessary to avoid the significant timing and logistic problems associated with achieving the same object by separate schemes of arrangement in each State.

(ii) National Guarantee Fund (NGF)

10. The main features of this aspect of the Bill are:

- (a) Establishment of a National Guarantee Fund to replace existing fidelity funds maintained by each capital city stock exchange.
- (b) Transfer of all assets and liabilities of those existing fidelity funds to the NGF.
- (c) The NGF will be administered by a corporation approved by the Ministerial Council and will provide investor protection by
 - (i) guaranteeing the performance of all reportable transactions in securities quoted on ASX exchanges; and
 - (ii) compensating investors for pecuniary and property loss as a result of the insolvency of a broker member of ASX.
- (d) Provision for any excess of the NGF over the required minimum amount to be used for national development of the securities industry - such national development expenditure must be approved by the Ministerial Council.

11. The essential differences between protection under NGF and that available under the existing fidelity fund arrangements are

- (a) a person's right to make a claim on the NGF will not depend on proof of defalcation or fraud by a broker;
- (b) there will be one central fund rather than six separate funds; and
- (c) a person will be able to claim directly against the NGF in respect of a dealer insolvency (cf. sub-ss.111(2) and 111(3) of the Securities Industry Act 1980).

ABBREVIATIONS

12. The following abbreviations are used in the explanatory memorandum:

SIA	Securities Industry Act 1980
CA	Companies Act 1981
NCSC	National Companies and Securities Commission
ASX Ltd	Australian Stock Exchange Ltd
AASE	Australian Associated Stock Exchanges
NGF	National Guarantee Fund
Ministerial Council	Ministerial Council for Companies and Securities

CONTENTS OF THE BILL

13. The Bill is divided into the following Parts

Part I	-	Preliminary
Part II	-	Amendments of Securities Industry Act 1980 (dealing with ASX Ltd and NGF)
Part III	-	Amendments of Companies (Acquisition of Shares) Act 1980
Part IV	-	Amendments of Companies Act 1981
Part V	-	Amendments of Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
Part VI	-	Amendments of National Companies and Securities Commission Act 1979

NOTES ON INDIVIDUAL CLAUSES

BILL PART I - PRELIMINARY

Clause 1 : Short Title

Clause 2 : Commencement

14. The majority of the provisions of the Bill will come into operation when proclaimed.

BILL PART II - AMENDMENTS OF THE SECURITIES INDUSTRY ACT 1980

Clause 3 : Principal Act

Clause 4 : Interpretation (s.4(1))

15. New definitions are inserted and existing definitions are modified in s.4 of the Securities Industry Act 1980 (SIA) to take account of the establishment of ASX Ltd, referred to in the Bill as 'the Exchange', the changed status of existing capital city stock exchanges as subsidiaries of ASX Ltd and transfer of membership of these exchanges to ASX Ltd. Terminology dealing with members of stock exchanges is also rationalised with the addition of a new definition of 'member organisation'.

Clause 5 : The Australian Stock Exchange Limited (New Part 11A)

Interpretation - (Proposed S.36A)

16. 'Nominated Exchange' is used in the new Part to identify those exchanges which become subsidiaries of ASX Ltd and whose members become members of ASX Ltd. Such exchanges will be those nominated before the commencement of the legislation by the Australian Associated Stock Exchanges (AASE) and will comprise the six existing capital city stock exchanges. By

operation of State application of laws legislation under the co-operative scheme, a nomination will be made in each State by the AASE by lodging notice in writing of the nomination with the National Companies and Securities Commission (NCSC).

17. Proposed subs.36A(2) provides that a contravention of any provision in the new Part will not be an offence under the particular provision or under the general penalty provision in s.141 of SIA.

Incorporation - (Proposed S.36B)

18. Proposed s.36B incorporates the ASX Ltd in the Australian Capital Territory as a company limited by guarantee under the Companies Act 1981. The incorporation by statute is not to be taken as being for a public or Commonwealth purpose.

Names of Exchange and Exchange Subsidiaries (Proposed s.36C)

19. Division 2 of Part III of the Companies Act 1981 deals with the reservation and registration of company names. Proposed s.36C in the Bill deems the names 'Australian Stock Exchange Limited' and the listed names of ASX Ltd subsidiaries to have been registered under the Companies Act 1981.

Additional Functions and Powers - (Proposed S.36D)

20. S. 67 of CA provides that a company has all the powers and legal capacity of a natural person. Proposed s.36D provides that the ASX Ltd also has powers and functions conferred by Commonwealth or State statute and requires ASX Ltd to perform such functions as are conferred on it by State Act, regulation or instrument.

21. S. 68 of CA provides that the rules of a company can restrict or prohibit certain exercises of power by the company. Proposed subs.36D(2) of the Bill ensures that any

power conferred by Commonwealth or State Acts cannot be so restricted.

Memorandum, Articles and Listing Rules of Exchange - (Proposed S.36E)

22. The memorandum, articles of association and listing rules of ASX Ltd will be those lodged with the NCSC by the AASE before the commencement of the legislation. The memorandum and articles so lodged will be deemed to have been registered under the Companies Act at the commencement of the legislation.

New Memorandum and Articles of Nominated Exchange - (Proposed S.36F)

23. The new memorandum and articles of each nominated exchange will be those lodged with the NCSC by the AASE before the commencement of the legislation.

Membership of Exchange - (Proposed S.36G)

24. On the commencement, of the legislation, members of the six capital city exchanges (the 'nominated exchange' in each State) become guaranteeing members of the ASX Ltd and are then subject to its business rules. Registered options members of the Sydney Stock Exchange Limited will not become members of ASX Ltd.

Membership of Nominated Exchange (Proposed S.36H)

25. On commencement members of the nominated exchanges cease membership of their exchanges. This does not mean that they are required to contribute as past members (under s.360 of CA) if those exchanges are wound up within 12 months of them ceasing membership.

26. The existing capital city exchanges on commencement of the legislation, become wholly owned subsidiaries of ASX Ltd i.e.

ASX Ltd becomes their only guaranteeing member. The directors of the capital city exchanges cease to be directors on commencement and each exchange is given a 14 day exemption from the operation of subs.219(1) of CA from the date of commencement i.e. they are given 14 days to appoint at least 3 directors.

27. Because ASX Ltd will be the only guaranteeing member of the subsidiary exchanges, proposed subs.36H(7) provides that subs.82(1) of CA does not apply to them (i.e. the requirement that a company other than a proprietary company have at least 5 members). In addition, the subsidiary exchanges will be deemed to be exempt proprietary companies for the purposes of s.250 of CA i.e. general meetings will be deemed to have been held and resolutions will be deemed to have been passed at such meetings if ASX Ltd (the only member) signs a document stating it is in favour of the resolution.

Disciplinary Proceedings in Respect of Past Conduct of Nominated Exchange Members (Proposed S.36J)

28. Where disciplinary proceedings (including appeals) arising under the business rules of a nominated exchange are outstanding on commencement, or where conduct engaged in before commencement is not yet the subject of disciplinary proceedings, ASX Ltd will take over from the nominated exchange the function of finalising those proceedings or commencing and finalising those proceedings. Such proceedings will still be governed by the business rules of the exchange before commencement. Where a member of a nominated exchange is still subject to a disciplinary order e.g. suspension, at the time of commencement, the effect of that order is continued in respect of that member's membership of ASX Ltd.

Seat Redemption Scheme (Proposed S.36K)

29. The Sydney Stock Exchange Ltd's seat redemption scheme is designed to facilitate the abolition of the system of 'seats'.

Under that scheme the Sydney Stock Exchange Ltd can levy members to fund payments to members whose seats are abolished. That payment is to be made by 1 July 1989 or when the person ceases to be a member of Sydney Stock Exchange Ltd.

30. Proposed s.36K provides that ASX is to assume responsibility for the scheme from the Sydney Stock Exchange Ltd. The cessation of membership of existing capital city stock exchanges under proposed s.36H will not be taken to be cessation for the purposes of the seat redemption scheme. It will only be cessation of membership of ASX Ltd that will give rise to payment obligations under the scheme. In addition, s.36K empowers the ASX Ltd to levy members who were previously members of Sydney Stock Exchange Ltd for the purposes of enabling ASX Ltd to comply with the scheme. A certain amount of the designated sum paid to ASX Ltd by Sydney Stock Exchange Ltd under proposed s.36M may also be earmarked for the scheme. Membership fees payable by members of ASX who before commencement were members of Sydney Stock Exchange Ltd can also be used for the scheme.

31. As the other capital city exchanges do not have seat redemption schemes (the Melbourne Stock Exchange Ltd seat redemption scheme will be paid out before commencement of the legislation), proposed s.36K will be translated out of their State's respective codes by regulation under State application of laws legislation.

Exchange to Take Over Main Board Listing Agreements (Proposed S.36L)

32. ASX Ltd will take over responsibility for main board listing from existing capital city exchanges (ASX Ltd's subsidiaries on commencement of the legislation) - main board listing will accordingly only be on ASX Ltd. (Second board listing will continue on the State subsidiaries).

33. Proposed s.36L provides for this by substituting ASX Ltd for each capital city exchange as a party in existing listing agreements between those exchanges and the listed companies. References to AASE listing requirements in those agreements will be taken to be references to ASX Ltd listing requirements.

34. Existing capital city exchanges will continue any existing legal proceedings involving main board listing agreements in their own name. However, under proposed subs.36L(3), ASX Ltd will indemnify those exchanges in respect of all liabilities incurred as a result of those proceedings.

Transfer of Certain Assets of Nominated Exchange (Proposed S.36M)

35. To enable ASX Ltd to take over responsibility for membership and main board listing from existing capital city exchanges, proposed s.36M requires those exchanges to pay to ASX Ltd an amount determined for each exchange by the NCSC after consulting ASX Ltd. The amount for each exchange must be determined by NCSC within 3 months of commencement of the legislation. A copy of the determination is to be provided to ASX and to the particular exchange and the amounts determined must be paid to ASX Ltd by the respective exchanges within 14 days of receiving the NCSC's determination.

Transfer of Part VIII Deposits Held by Nominated Exchange (Proposed S.36N)

36. Part VIII, SIA requires a member of an exchange to lodge a deposit with the exchange which is then held on trust for the member by the exchange. Proposed s.36N will transfer those deposits held by capital city exchanges, on those exchanges becoming ASX subsidiaries, to ASX Ltd which will similarly hold such deposits on trust for each member. In addition any property in which a deposit has been invested by a capital city exchange will be transferred to ASX Ltd.

How Parts VIII and IX Apply in Relation to a Local Exchange
Subsidiary (Proposed S.36P)

37. There will be a period between the commencement of the legislation and the nomination of a body corporate as the National Securities Exchanges Guarantee Corporation by the Ministerial Council under proposed s.122BA. Proposed s.36P provides that during that period the ASX Ltd will pay interest received on invested deposits under s.97 of SIA to the fidelity fund of the local Exchange subsidiary and the repayment by the ASX Ltd to the member who made the deposit will be guaranteed by that subsidiary. Part IX of SIA will effectively continue to operate in respect of ASX Ltd subsidiaries for as long as is necessary to fully complete the transition from individual fidelity funds to a fully operational National Guarantee Fund. Thus claims arising before commencement, or even after commencement but before the establishment of the NGF corporation, will be able to be satisfied under the continued operation of Part IX for ASX Ltd subsidiaries.

Appointment of New Trustees of Certain Trusts (Proposed S.36Q)

38. Existing trusts established by existing capital city exchanges and the AASE (e.g. trusts in respect of employees' superannuation) will, by virtue of proposed s.36Q, be continued by ASX Ltd. This may necessitate replacement of trustees under those trusts with ASX Ltd trustees. Any new replacement trustees must be appointed within 12 months of the commencement of the legislation. (Subs.36Q(2)).

Transfer of Assets and Liabilities of AASE (Proposed S.36R)

39. On commencement, all the assets and liabilities of AASE will be transferred to ASX Ltd. ASX Ltd will also be substituted for AASE as a party to agreements entered into by AASE before commencement (subs.36R(2)) and as a party to any

legal proceedings commenced by AASE before commencement (subs.36R(3)).

Transfer of AASE Employees (Proposed s.36S)

40. On commencement, employees of AASE will become employees of ASX Ltd on the same terms and conditions as with AASE and with fully preserved superannuation etc entitlements.

Part Not to Prejudice Corresponding Provisions (Proposed S.36T)

41. Proposed S.36T relates to State and Territory application of laws legislation and translator regulations under that legislation which apply the Commonwealth legislation with certain modifications in the particular State or the Northern Territory. It ensures that these are given full effect in relation to conferring rights on ASX Ltd or subjecting that body to obligations.

Clause 6 : Qualified Privilege in Respect of Defamation Proceedings (New s.42B)

42. Protection against defamation proceedings is provided to securities exchanges, their members, officers or employees (including subsidiaries of ASX Ltd and their members etc) in respect of statements made by them without malice arising out of disciplinary proceedings involving a member of an exchange under the business rules of the exchange.

43. Publication of such statements is similarly protected (subs.42B(4)).

44. This protection recognises the importance of the possibility of publication of the results of disciplinary proceedings as a deterrent, in addition to, or instead of, a fine or other penalty.

Clause 7 : Deposits with Stock Exchanges by Member Organisations (Substitution of New SS.94A and 95)

Interpretation (Proposed New S.94A)

45. Part VIII of SIA deals with deposits which members and member firms are required to lodge with stock exchanges. Proposed new s.94A, in effect, exempts ASX Ltd subsidiaries from the requirements under Part VIII. This is done because those subsidiaries will not have broker members - on commencement all members of the capital city exchanges are transferred to ASX Ltd. Accordingly, deposits will be lodged with ASX Ltd.

Deposits To Be Lodged By Member Organisations (Substitution of New S.95)

46. The substance of the obligation in repealed s.95 is not changed in the new section i.e. the requirement that members of stock exchanges make deposits with the stock exchange or, if they are members of more than one stock exchange, with one of those stock exchanges, remains. However, the terminology used in the repealed section in relation to categories of membership of stock exchanges is changed to reflect the new definition of 'member organisation' in subs.4(1) - see sub-clause 4(g) of the Bill and para. 15 of this explanatory memorandum.

Clause 8 : Deposit To Be Proportion of Trust Account Balances (S.96)

47. These amendments reflect the change in terminology in new s.95 (see clause 7, para. 46 above).

Clause 9 : Deposits To Be Invested By Stock Exchange (S.97)

48. Sub-clauses (a) and (c) effect changes in terminology which are again a consequence of the change in terminology in

new s.95 (see clause 7, para. 46 above). Sub-clauses (b) and (d) amend S. 97 to reflect the establishment of the National Guarantee Fund (see clause 11 of the Bill).

49. Under s.97, stock exchanges are required to invest deposits received by them under s.95. At present, interest from those deposits is to be paid into the respective fidelity funds of the stock exchanges established under Part IX of SIA. The establishment of the National Guarantee Fund by this Bill will mean that the fidelity funds of the capital city exchanges and any 'participating exchange' under Part IXA will be transferred to the NGF. Therefore sub-clause (b) provides that interest received from investment of deposits by a 'participating exchange' (it is likely ASX Ltd will be the only 'participating exchange' at time of commencement of the legislation) will be paid into the NGF. Where such deposits are made, the NGF will guarantee repayment of deposits (s.97(8)).

50. Those stock exchanges which continue to operate separate fidelity funds under Part IX after the commencement of the legislation will continue to be required to pay interest on deposits into those fidelity funds (subs.97(3A)). In such cases the fidelity fund of the stock exchange will continue to guarantee repayment of deposits (subs.97(9)).

Clauses 10-14

51. These clauses effect minor consequential changes:

- Clause 10 (Accounts in respect of deposits) amends s.98 of SIA as a consequence of establishment of ASX.
- Clause 11 (Claims, etc, not affected by this Part) reflects the change of terminology in new s.95 (see clause 7 para. 46 above).

- Clause 12 (Insertion of new section - 99A Interpretation) inserts, by reference to Part IXA, a definition of 'participating exchange'
- Clause 13 (Establishment of fidelity fund) exempts ASX Ltd and its subsidiaries from the requirement to keep fidelity funds under Part IX (ASX exchanges will instead be covered by NGF and new Part IXA)
- Clause 14 (Claims against the fund) represents part of the transitional provisions in respect of the continued operation of existing fidelity funds until the particular exchange becomes a participating exchange (i.e. a member of the corporation running the NGF and as such covered by the NGF provisions).

Clause 15 : Insertion of New Part - Part IXA - The National Guarantee Fund

Division 1 - Interpretation

Interpretation - Proposed S.122AA

52. Proposed subs.122AA(1) inserts a number of interpretation provisions for the purposes of proposed Part IXA. Some of the more important definitions are as follows.

- 'corporation' means the body corporate which is nominated by the Ministerial Council to be responsible for the operation of the NGF.
- 'eligible exchange' means ASX Ltd, or a securities exchange or recognised securities exchange (i.e. recognised by State or Territories pursuant to the co-operative scheme) other than an ASX Ltd subsidiary.
- 'minimum amount' refers to the amount which the corporation determines, with Ministerial Council approval, to be the minimum amount maintained in the Fund. This will initially be \$15 million but provision is made for this to be increased or decreased.

- 'participating exchange' is an eligible exchange that is a member of the corporation running the NGF.
- 'property' is defined to include the types of property most commonly used as consideration in share purchases.
- 'reportable transaction' means a sale or purchase of securities quoted on an exchange that according to the exchange's business rules is to be reported to the exchange by a member organisation.
- 'settlement documents' are those documents which are sufficient to discharge the obligations of the seller in a sale of securities.
- 'transaction' means a sale or purchase of securities.

53. Proposed subs.122AA(2) provides that a failure to comply with a provision of the NGF provisions does not constitute an offence under the particular provision or under the general penalty provision of SIA (s.141).

Excluded Person - (Proposed s.122AB)

54. The categories of person are set out who may not make a claim in respect of property entrusted to, or received by, a dealer before that dealer becomes insolvent (under proposed s.122R). Proposed sub-s.122AB(2) extends the definition of excluded person to include a relative of a spouse of a person. Proposed subs-s.122AB(3) effectively excludes ordinary employees of body corporates from the excluded person category.

Becoming Insolvent (Proposed S.122AC)

55. The circumstances are set out in which a body corporate and a natural person will be taken to be insolvent for the purposes of Part IXA. The situation where a dealer becomes

insolvent triggers the right to claim under proposed s.122R (see para. 90 below).

Permitted Investments (Proposed S.122AD)

56. Where money in the NGF or in a development account (under Division 5) is not immediately required for the purposes set out, it may be invested in a 'permitted manner'. Proposed s.122AD defines these investments. Permitted investments are investments in authorised trustee investments or deposits with an authorised dealer in the short term money market (based on SIA s.110).

Division 2 - The Corporation

Ministerial Council to Nominate (Proposed S.12BA)

57. The Ministerial Council may nominate a company limited by guarantee as the National Securities Exchanges Guarantee Corporation. The corporation will be responsible for the operation of the NGF. Included in the criteria for nomination will be the ability of the corporation to perform its functions under the fund provisions having regard to the interest of the public, the sufficiency of indemnity insurance and the suitability of the business rules in respect of ensuring safety of property and protection of the interests of the public. Membership of the corporation is to be limited to the ASX Ltd and any other eligible exchanges.

Functions and Powers Under Fund Provisions (Proposed S.122BB)

58. Proposed s.122BB performs the same function in relation to the corporation running the ASX as proposed s.36D performs in relation to ASX Ltd (see paras. 20 and 21 above).

Commission To Be Notified of Amendments to Business Rules
(Proposed S.122BC)

59. Where an amendment is made to the business rules of the corporation, it must give notice of it, within 21 days of the amendment, to the NCSC. The NCSC is then required to notify the Ministerial Council who may, within 28 days, disallow the amendment.

Division 3 - The Fund

Establishment (Proposed s.122CA)

60. The corporation will establish and maintain the NGF which will be administered by the Board of the corporation. Although the assets of the NGF will be the property of the corporation, the corporation will only be able to use the NGF for the purposes set out in this legislation and not mingle it with its own operating funds.

Property Constituting Fund (Proposed S.122CB)

61. The NGF will consist of money from a number of sources set out in proposed subs.122CB(1). Initially, the NGF will be established with money from the existing fidelity funds of securities exchanges which become participating exchanges. The amount to be paid to the NGF from existing fidelity funds will ensure that the initial minimum amount of \$15 million is obtained.

Fund to Be Kept in a Separate Bank Account (Proposed S.122CC)

62. Money in the NGF is to be kept in a separate bank account in Australia until dealt with in any manner provided for in Part IXA.

Payments Out of Fund (Proposed S.122CD)

63. The corporation is only permitted to use the NGF for the purposes set out in Part IXA. Proposed subs.122CD(1) sets out the purposes for which money may be paid out.

64. Payments in respect of contract guarantees will have priority over payments in respect of a member's insolvency regardless of the order in which claims are made. (Proposed subs.122CD(3)).

Accounts of Fund (Proposed S.122DA)

65. As the body responsible for the NGF, the corporation will be required by proposed s.122DA to keep proper accounts of the NGF, to appoint an auditor to audit those accounts and to give to the NCSC and participating exchanges a copy of the auditor's report.

Investment of Fund (Proposed S.122DB)

66. Money in the NGF not immediately required for its purposes may be invested in a 'permitted manner' - see para. 56 above.

Interest and Profits from Investment of Fund (Proposed S.122DC)

67. Moneys earned from investment of the NGF are to be applied to pay administration expenses of the NGF and premiums payable in respect of contracts of insurance or indemnity. Any excess is to be paid into the NGF.

Minimum Amount of Fund (Proposed S.122DD)

68. Proposed s.122DD gives the corporation the power to determine the minimum amount of the Fund, subject to Ministerial Council approval. This will give the corporation the flexibility to maintain the NGF at a viable level while

the Ministerial Council will retain overall responsibility for the level of the NGF.

Division 4 - Levies Where Fund Less Than Minimum Amount

Levy on Reportable Transactions (Proposed S.122EB)

69. The NGF may fall below the minimum amount if there are large sums paid out or the minimum amount is increased. To maintain the minimum amount the corporation may impose a levy on a sale or purchase of securities ('transaction levy') under this proposed section or a levy on participating exchanges (proposed s.122FB - see para. 73 below).

70. The transaction levy is imposed at a rate and on a class or classes of reportable transactions determined by the corporation and may vary according to the type of securities or the class of dealers entering into the transaction.

Payment by Leviable Dealer (Proposed S.122EC)

71. Where a transaction levy is imposed, the 'leviable' dealers will be required to pay the levy to their exchange which, in turn, is required to pay it to the corporation, which will then pay it into the Fund. Leviable dealers will be required to furnish to their exchange sufficient particulars of the transaction to enable ascertainment of the amount of the levy.

Revocation of Levy on Reportable Transactions (Proposed S.122FA)

72. Proposed S.122FA enables the Corporation to revoke a transaction levy.

Levy on Participating Exchanges (Proposed S.122FB)

73. In addition to, or instead of, a transaction levy under proposed s.122EB, the corporation may impose a levy on participating exchanges apportioning the levy between participating exchanges as it sees fit.

Levy by Participating Exchange on Members or Member Organisations (Proposed S.122FC)

74. If a levy is imposed on a participating exchange under proposed S.122FB, the participating exchange may raise the levy by imposing a levy on a class or classes of its members or member organisations with the possibility of different rates being applicable to different classes of members.

Division 5 - Securities Industry Development Accounts

Payments Where Fund Exceeds Minimum Amount (Proposed S.122GB)

75. If at any time the amount in the NGF exceeds the minimum amount, the corporation has the discretion to distribute the excess in part or in full to the participating exchanges (for industry development purposes - as to which see para. 76). Where an apportionment of the excess is made between participating exchanges or where the Board of the corporation decides to pay it to only one exchange, it must be just and equitable having regard to contributions made by, and amounts paid out in respect of, particular exchanges. This, however, is not intended to require payments to be strictly in proportion to contributions or pay-outs made i.e. flexibility is necessary to allow the corporation to operate efficiently.

Payments Into and Out of Development Account (Proposed S.122GC)

76. The funds distributed to the exchanges are to be kept in a separate account and shall only be applied towards industry development purposes approved by the Ministerial Council. Such

approval may be subject to conditions and under proposed subs.122GC(4), a purpose of reimbursing money spent before commencement on the development of the securities industry is to be taken to be an industry development purpose (It is envisaged that the Ministerial Council will approve moneys already spent on clearing house development). Where a participating exchange pays out for other than approved purposes or fails to comply with a condition of the approval, it is required to reimburse the development account from its own funds.

Investment (Proposed s.122GD)

77. Money in development accounts not immediately required for development purposes can be invested in a 'permitted manner' (defined in proposed s.122AD - see para. 56).

Accounts (Proposed s.122GE)

78. A participating exchange will be required to lodge with the NCSC an annual statement in respect of expenditure from its development account.

Division 6 - Contract Guarantees

Interpretation (Proposed S.122H)

79. The more important definitions are as follows:

- 'completion period' is the period contained in the business rules of a participating exchange, or, if there is no period specified in the business rules, a reasonable period, within which a transaction between dealers should be completed. The expiration of this period is used in proposed ss.122J and 122K to designate the time at which claims may be made.

- 'dealer' means a member organisation of a participating exchange.
- 'prescribed period' is the period contained in the business rules of a participating exchange, or, if there is no period specified in the business rules, a reasonable period, within which a dealer must fully settle with its client in respect of a transaction. The expiration of this period is used in s.122L and s.122M to designate the time at which claims by a client may be made.
- 'purchase price' means the cost of purchasing securities and any other fees, charges and taxes payable by the purchaser.

Claim by Selling Dealer in Respect of Default by Buying Dealer
(Proposed s.122J)

80. Where, at the end of the 'completion period' (see para. 79 above), a buying dealer has not fulfilled his obligations in respect of settlement of the transaction in securities (i.e. supplied the consideration) and the selling dealer has fulfilled his obligation (i.e. supplied settlement documents) or is in an immediate position to do so in relation to that transaction, the selling dealer may make a claim against the corporation. Where the corporation is satisfied that the above circumstances continue to prevail and that the claimant has supplied settlement documents to it (or has already supplied them to the buying dealer), it is required to pay the claimant out of the Fund, the amount of the consideration due.

81. In this way s.122J provides a contract guarantee to a selling dealer (as does 122K to a buying dealer) that the corporation will complete the defaulting dealer's obligations in the transactions.

Claim by Buying Dealer in Respect of Default by Selling Dealer
(Proposed S.122K)

82. In the same way that proposed s.122J provides a contract guarantee to selling dealers, proposed S.122K provides a contract guarantee to buying dealers in respect of a selling dealer's failure to meet his settlement obligations within the completion period (i.e. to provide settlements documents).

83. Where a successful claim is made by the buying dealer, the corporation can either supply settlement documents to the dealer or supply a cash equivalent if settlement documents are unobtainable (see proposed s.122N - para. 87 below).

Claim by Selling Client in Respect of Default by Selling Dealer (Proposed S.122L)

84. This section and proposed s.122M represent the other category of contract guarantees provided by proposed Division 6. Where the client of the selling dealer has completed his obligations in respect of a transaction entered into on his behalf by the selling dealer (i.e. supplied settlement documents to the dealer) and the selling dealer has not, within the 'prescribed period' (see para. 79 above), supplied to the client the consideration received for the sale or has not dealt with that consideration in accordance with the client's instructions, the client may claim against the corporation.

85. Where the corporation is satisfied that the claimant is entitled to claim (i.e. the events above described still exist), it is required to pay the claimant the consideration less any unpaid brokerage or other charges.

Claim by Buying Dealer in Respect of Default by Buying Dealer
(Proposed S.122M)

86. In the same way that proposed s.122L provides a guarantee to selling clients in respect of failure by the selling dealer to meet his obligations, proposed s.122M provides a guarantee to a buying client where the buying dealer fails, within the 'prescribed period' to meet his obligations to the client i.e. where the dealer has not obtained the settlement documents or has obtained them but dealt with them otherwise than in accordance with instructions. Where the corporation allows the claim it is required to supply settlement documents to the claimant or, under proposed s.122N, pay cash compensation, if those settlement documents are unobtainable.

Cash Settlement of Claim Where Settlement Documents
Unobtainable (Proposed S.122N)

87. Where the corporation allows a claim made by a buying dealer or a buying client, the corporation may pay an amount equal to the pecuniary loss supplied by that claimant where it is not reasonably practicable for the corporation to provide settlement documents.

88. Such a situation may arise where:-

- (a) an orderly market does not exist in the relevant securities; or
- (b) a "market corner" exists in the securities (i.e. there is insufficient scrip for whatever reason to satisfy demand).

Making of Claims (Proposed S.122P)

89. Claims under the contract guarantee provisions will only be available, in the case of proposed ss.122J and 122K, where both persons in the transaction are dealers and, in the case

of proposed ss.122L and 122M, where the other person is a dealer. In addition, claims against the NGF must be in writing and, unless served on the corporation within 6 months after the day on which the claim arises, will be barred (unless the Board of the corporation determines otherwise).

Division 7 - Claims in Respect of Insolvent Members

Claims in Respect of Property Entrusted to, or Received by, Dealer Before Dealer Became Insolvent (Proposed S.122R)

90. The second way in which the NGF is to be used to provide investor protection is in the event of a dealer's insolvency. Proposed Division 7 provides for the use of the NGF to pay compensation or to purchase replacement property to clients of a dealer (except 'excluded persons' - see para.54 above) who suffer loss in the event of the dealer's insolvency. Such loss may be suffered in respect of money, securities, documents of title to securities or other property which must have been entrusted to or received by the member (or an employee thereof) in the course of or in connection with the dealer's business of dealing in securities.

Cash Settlements of Claims Where Property Unobtainable (Proposed S.122S)

91. The corporation may compensate clients by way of cash settlement where it is not reasonably practical for the corporation to obtain the property in question. Such a situation may arise where an orderly market for the securities does not exist or a 'market corner' exists (see also para. 88 above).

No Claim Where Property Recoverable Under Division 6 (Proposed s.122T)

92. If a claimant has been reimbursed under Division 6 then no claim for the same contract is allowed under Division 7.

No Claim in Respect of Money Lent to Dealer (Proposed s.122U)

93. The loss must be suffered in respect of money, securities, documents of title to securities or other property entrusted to or received by a dealer in the course of, or in connection with, the dealer's business of dealing in securities. No claim is allowable in respect of money lent to a dealer. .

No Claim in Certain Other Cases (Proposed s.122V)

94. Claims under Division 7 will not be permitted in relation to insolvencies which occurred before the relevant exchange became a participating exchange. Claims will not be allowed if the claimant, in the view of the Board of the corporation or the Court, materially contributed to the dealer becoming insolvent.

Limits of Compensation (Proposed S.122W)

95. The limits for pecuniary compensation will be:

(a) the aggregate compensation payable out of the Fund in respect of a dealer's insolvency inclusive of any interest component, shall not exceed 14% of the prescribed minimum level of the NGF at the date that the dealer was declared insolvent;

(b) compensation payable to any one client of an insolvent dealer in respect of losses of cash or property shall not exceed \$50,000 subject to the aggregate limit defined in (a) above.

96. In the case of a partnership, proposed subs.122W(3) provides that the NGF is liable to a claimant to a maximum of \$50,000 regardless of how many partners become insolvent.

97. For the purpose of calculating the aggregate compensation, an amount that is paid by the corporation shall, to the extent

to which that amount is repaid to the corporation from the estate of the insolvent member, be disregarded.

98. By imposing a statutory limitation on payments from the NGF, the possibility arises that claims may exceed the statutory maximum. This will mean that the corporation must consider and either validate or reject all claims for compensation due to insolvency before any distribution is made to the claimants. If the claim total exceeds the statutory maximum, a pro-rata distribution will be made to the claimants.

99. In determining the pro-rata distribution, the corporation may take into account the fact that some claimants have received partial satisfaction of their claims from other sources. The corporation is to be permitted to use whatever calculations are appropriate to achieve the objective of all claimants receiving similar percentage payments of their total claim. This is subject to the prescribed limit on individual claims for compensation.

Making of Claims (Proposed S.122X)

100. As there is a maximum limit on payments from the NGF in respect of any one insolvent dealer, all claims will have to be made within a specified period to allow finalisation of a pro-rata distribution to occur within a determinable period.

101. Claims must be made within either:

- (a) the three month limit specified by the corporation in a notice published in a daily newspaper; or
- (b) if no such notice is published, six months after a person becomes aware of the dealer becoming insolvent.

102. Claims not made within this time will be barred unless the Board of the corporation determines otherwise.

103. Proposed subs.122X(4) provides that it is a defence to an action for damages arising out of the publication of a notice under the section, if the person can establish that the notice was published in good faith and for the purposes of the section.

Division 8 - Claims under Division 6 and 7

104. Proposed Division 8 deals with matters ancillary to both Divisions 6 and 7.

Power of Board to Allow and Settle Claim (Proposed S.122YA)

105. The Board of the Corporation is entitled to allow and settle claims at any time after a person becomes entitled to make a claim.

Successful Claimant Entitled to Costs and Disbursements (Proposed S.122YB)

106. A successful claimant is entitled to reasonable costs and disbursements incidental to the making of a claim .

Interest (Proposed S.122YC)

107. Interest at 5% per annum, or such other rate as is prescribed, is payable on the value of the claim from the day it arose until the claim is paid. Interest is not payable on costs and disbursements incidental to the claim.

Application of Fund in Respect of Certain Claims (Proposed S.122YD)

108. Proposed s.122YD provides the corporation with power to purchase securities under those sections where it is required to compensate claimants by the supply of securities. Such securities purchased form part of the NGF until supplied to the claimant. Proposed subs.(3) covers the situation where the

corporation decides to purchase securities but is unable to purchase sufficient to meet the claim. In such a case, cash settlement is made to the client and the corporation, by virtue of subs.(3), is required to sell the securities purchased and pay the proceeds into the Fund.

Allowing of Claim Not to Constitute Admission (Proposed s.122YE)

109. The allowance of a claim by the corporation will not constitute an admission by any person of any liability. This is intended to include any stockbroker master policy of professional indemnity insurance.

Corporation to Notify Claimant Where Claim Disallowed (Proposed s.122YF)

110. The corporation must notify a claimant of the disallowance of the claim.

Proceedings in the Court (Proposed s.122YG)

111. Within three months of such disallowance, a claimant may commence proceedings in the Court to establish the claim. If the corporation has not allowed, or disallowed, a claim within a reasonable period, the claimant may similarly commence proceedings.

Arbitration of Amount of Cash Settlement of Certain Claims (Proposed s.122YH)

112. If the corporation decides to make a cash payment to a claimant in respect of a purchase of securities and the corporation and the claimant are unable to agree to a settlement price, the matter is to be referred to arbitration. The arbitration is to be conducted by a special committee of three persons, a majority of whom are to be independent of the corporation and the participating exchanges and whose

appointment must be approved in writing by the Ministerial Council .

Form of Order of Court Establishing Claim (Proposed S.122YJ)

113. Where the Court is satisfied that a claim should be allowed it is required to make by order, a declaration accordingly, and to direct the Board to allow the claim. The Court is given a wide discretion to make such directions as it thinks fit in relation to a claim.

Power of Board to Require Production of Securities, etc
(Proposed s.122YK)

114. As the Corporation will determine any claims upon the NGF, it will be given power to require the production of documents necessary to establish a claim. This will extend to enabling criminal proceedings to be taken against a person. Failure to comply with a requirement to produce may lead to disallowance of a claim.

Subrogation of Corporation to Rights, etc., of Claimant
(Proposed s.122ZA)

115. Where a contract guarantee has been invoked and the corporation has satisfied the claim, the corporation will have a statutory right of action against the defaulting member for the amount which the corporation has paid out of the Fund to satisfy the claimant. In effect, the claimant will have assigned his rights against the defaulting dealer to the corporation. At the time that it satisfies such a claim, the corporation is to notify the defaulting member's professional indemnity insurer, which may elect to be joined as a party to any proceedings between the corporation and the defaulting dealer. Any judgment obtained against the defaulting member by the corporation may be enforced against the insurer unless the insurer has proved that the insurance policy does not cover the factual circumstances giving rise to the judgment.

Payments of Claims only from Fund (Proposed S.122ZB)

116. No property of the corporation, other than the NGF, may be used to meet a claim allowed by the Board of the corporation.

Corporation to Enter into Contracts of Insurance or Indemnity (Proposed S.122ZC)

117. The corporation may enter into an insurance policy which may indemnify the NGF against losses arising from meeting its obligations in guaranteeing performance of contracts and in meeting claims arising from a member's insolvency. A claimant against the NGF does not have any claim against the corporation's insurer, nor any specific right to claim any moneys paid under the insurance policy.

Instalment payments (Proposed s.122ZD)

118. Where claims against the NGF are of such magnitude that they are likely to substantially deplete the NGF, the corporation is authorised to make instalment payments to claimants pending recovery of the NGF through the imposition of levies.

Division 9 - Transitional

Interpretation (Proposed s.122ZE)

199. Some of the main definitions are as follows:

- 'founding exchange' means an original member of the NGF corporation or an ASX subsidiary at the time of commencement of the corporation (i.e. one of the capital city exchanges)
- 'joining exchange' means an exchange which becomes a member of the corporation or an ASX subsidiary after

the time of commencement of the NGF corporation

- 'liability provisions' are those dealing with claims against the fidelity funds under Part IX of SIA
- 'transferred claim' means an outstanding claim against a fidelity fund of an exchange arising before the exchange becomes a founding exchange or joining exchange
- 'transferring exchange' means a founding or a joining exchange

Assets and Liabilities of Transferring Exchange's Fidelity Fund (Proposed S.122ZF)

120. On becoming a transferring exchange, the exchange is required to transfer all money in its fidelity fund to the NGF. All investments and property of the fidelity fund and rights in connection with the administration of the fidelity fund vest in the corporation running the NGF and become part of the NGF. The corporation also becomes liable for the fidelity fund's debts and other obligations in connection with the administration of the fidelity fund. The corporation is also substituted for the transferring exchange in respect of agreements entered into by the exchange after it becomes a transferring exchange and in respect of Court or Tribunal proceedings which relate to administration of the fidelity fund.

Final Accounts in Respect of Transferring Exchange's Fidelity Fund (Proposed S.122ZG)

121. Within 2 months of becoming a member of the corporation or becoming an ASX subsidiary, an exchange must arrange for a statement of assets and liabilities to be prepared for its fidelity fund as at the day of transfer to the NGF and appoint an auditor to audit the statement. The auditor must audit the

statement within a month of the statement being prepared and provide a report to the Board of the corporation and a copy to the Committee of the exchange. The Board of the corporation must give the NCSC a copy of the report within 14 days of receipt of the report.

Application of Liability Provisions in Relation to Transferred Claims (Proposed S.122ZH)

122. Proposed s.122ZH provides that the Board of the corporation running the NGF will take over the responsibilities of the transferring exchange in relation to claims which arose before the exchange became a transferring exchange but which have not been considered or satisfied under the fidelity fund provisions. Claims will be assessed and paid out in accordance with ss.111 to 120 of Part IX of SIA.

BILL PART III - AMENDMENTS OF COMPANIES (ACQUISITION OF
SHARES) ACT 1980

Clause 16 : Principal Act

Clause 17 : Definitions (S.6)

123. Clause 17 amends the definition section of the Companies (Acquisition of Shares) Act to include appropriate definitions of, 'Exchange' and 'Exchange subsidiary'. Some of the other important definitions are as follows:

- 'dealer' means a member of ASX Ltd
- 'home stock exchange' for each listed company means the stock exchange designated to the company by ASX as its home exchange.
- 'relevant official meeting' means an official meeting of ASX held on a stock market of the company's home exchange.
- 'representative' in relation to a 'dealer' is defined to include an employee or partner of the dealer.

Clause 18 : Other Interpretative and Evidentiary Provisions
(S.8)

124. A reference to a stock market of ASX Ltd includes a stock market of an ASX Ltd subsidiary (Proposed subs.8(9A)).

125. An announcement by a dealer's representative at an official ASX meeting is deemed to be made by the dealer. (Proposed subs.8(9B)).

Clause 19 : Takeover Announcements (S.17)

126. S. 17 provides for takeover announcements in respect of main board listed companies to be made on a stock exchange. The substantive elements of a 'takeover announcement' remain but clause 19 amends that section to reflect the fact that all main board listing is on ASX Ltd and that members of existing capital city exchanges become members of ASX on commencement of the legislation. Accordingly a takeover announcement is made by a member of ASX at a 'relevant official meeting' of the company's 'home stock exchange' (see para. 123 above).

Clause 20 : Declaration Where Take-over Offers are Conditional (S.28)

127. This clause replaces the reference to 'listed public company' with the more appropriate 'stock exchange listed company'.

Clause 21 : Withdrawal of On-Market Offers (S.33)

128. Similar amendments are made to this section as are made to s.17 (see para.126 above) to reflect the changes made in respect of membership of existing capital city exchanges being transferred to ASX Ltd and main board listing responsibility being transferred to ASX Ltd.

Clause 22 : Suspension of Acceptance of Offers Made by Virtue of Take-over Announcement (S.34)

129. This amendment is consequential on the new definition of 'dealer' in s.6 (see para.123 above).

BILL PART IV - AMENDMENTS OF COMPANIES ACT 1981

Clause 23 : Principal Act

Clause 24 : Interpretation (s.5)

130. A definition of 'Exchange' (ASX Ltd) is inserted.

Clause 25 : Copy of Notice to be Served on Securities Exchange

131. These amendments are consequential on the establishment of ASX Ltd.

BILL PART V - AMENDMENTS OF COMPANIES AND SECURITIES
(INTERPRETATION AND MISCELLANEOUS PROVISIONS) ACT 1980

Clause 26 : Principal Act

Clause 27 : Definitions (S.9)

132. A definition of 'Northern Territory Enactment' is inserted.

BILL PART VI - AMENDMENT OF NATIONAL COMPANIES AND SECURITIES
COMMISSION ACT 1979

Clause 28 : Principal Act

Clause 29 : Interpretation (s.2)

133. The definition of 'Northern Territory enactment' and 'State Act' are omitted, because these terms are now defined in the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980.